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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/458,875	12/10/1999	DAVID J. KELLER	99-0738	9389

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EXAMINER

GOUDREAU, GEORGE A

ART UNIT	PAPER NUMBER
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1763

DATE MAILED: 07/16/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09-458875

Applicant(s)

Kelce

Examiner

George Goudreau

Group Art Unit

1763

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- ☒ Responsive to communication(s) filed on 4-30-02
- ☒ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-19, 21-23, 25-26 is/are pending in the application.
- ☐ Of the above claim(s) is/are withdrawn from consideration.
- ☐ Claim(s) is/are allowed.
- ☒ Claim(s) 1-19, 21-23, 25-26 is/are rejected.
- ☐ Claim(s) is/are objected to.
- ☐ Claim(s) are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
 - ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____
 - ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☐ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other _____

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15. Claims 21, 23, and 25-26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

-Claim 21 depends upon canceled claim 20. (Claim 21 should depend upon claim 19.);

and

-In line 7 of claim 23, the phrase "an oxygen flow rate of between about 35" should read "a flow rate of between about 35".

16. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

17. Claims 1-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Amini et. al. as applied in paragraph 17 of the previous office action.

18. Claims 1-9, 11, 23, and 25-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schwartzman et. al. as applied in paragraph 18 of the previous office action.

19. Claims 1-19, 21-23, and 25-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rizzuto as applied in paragraph 19 of the previous office action.

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20. Applicant's arguments filed 4-30-02' have been fully considered but they are not persuasive.

Applicant argues the following points regarding the examiner's rejection of their claimed subject matter.

-The prior art used by the examiner to reject applicant's claimed subject matter fails to teach etch processes which employ the specific process parameters which are claimed by the applicant. (Applicant seems to be trying to argue that their claimed etch process parameters represent a showing of unexpected results which the prior art of record fails to teach.); and

-Claim 26 as now amended uses "consisting essentially of" claim language which would preclude the presence of the He used in the plasma etchant taught by Shwartzman et. al.; The examiner must disagree.

-It is irrelevant that the prior art of record is silent in regards to many of the claimed etch process parameters of applicant since applicant has failed to make a proper showing of unexpected results in regards to these claimed etch process parameters. The examiner must remind applicant that in order to obtain benefit of a showing of unexpected results as related to claimed etch process parameters, applicant must do two things. First, applicant needs to establish what the ranges are for each etch process parameter in which unexpected results occur. Second, applicant must claim their claims commensurate in

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scope with any showing of unexpected results. Applicant has failed to do either of these things., and

-In regards to applicant's usage of the phrase "consisting essentially of" in claim 26 as now amended in order to preclude the presence of He in their claimed etchant, the examiner has the following comments to make. In order to establish which compounds may or may not be present in a plasma etchant which is described using the phrase "consisting essentially of", applicant needs to define what the basic, and novel characteristics of their invention are. This is necessary in order to establish which compounds may be additionally present in applicant's claimed etchant without effecting the basic, and novel characteristics, and which compounds may not be present since they effect the basic, and novel characteristics of the invention. Applicant has failed to do such. Thus, it is unclear to the examiner what the scope of the term "consisting essentially of" is in claim 26. Thus, the examiner will interpret this phrase to have the same scope of the term "comprising". Further, applicant claims, and specification teach that He may be optionally present with O₂ in their plasma etchant. Thus, it would appear to the examiner that applicant's claims, and specification teach that He does not effect the basic, and novel characteristics of their invention. Thus, the phrase "consisting essentially of" would not seem to preclude the presence of He in applicant's claimed plasma etchant contrary to what applicant purports. Further, the examiner cites the following case law of interest to the applicant in this regard.

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"A consisting essentially of" claim occupies a middle ground between closed claims that are written in a consisting of format and fully open claims that are drafted in a comprising format." PPG Industries v. Guardian Industries, 156 F.3d 1351, 1354, 48 USPQ2d 1351, 1353-54 (Fed. Cir. 1998).

For search and examination purposes, absent a clear indication in the specification of what the basic and novel characteristics actually are, "consisting essentially of" will be construed as equivalent to "comprising." See, e.g., PPG, 156 F.3d at 1355, 48 USPQ at 1355 ("PPG could have defined the scope of the phrase consisting essentially of for purposes of its patent by making clear in its specification what it regarded as constituting a material change in the basic and novel characteristics of the invention."). When an applicant contends that additional steps or materials in the prior art are excluded by the recitation of "consisting essentially of," applicant has the burden of showing that the introduction of additional steps or components would materially change the characteristics of applicant's invention.

21. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period

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will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

22. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner George A. Goudreau whose telephone number is (703) -308-1915. The examiner can normally be reached on Monday through Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Examiner Gregory Mills, can be reached on (703) -308-1633. The appropriate fax phone number for the organization where this application or proceeding is assigned is (703) -306-3186.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) -308-0661.


George/A. Goudreau/gag

Primary Examiner

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